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O L S O N , B Z D O K & H O W A R D

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June 25, 2020

Ms. Lisa Felice  
Michigan Public Service Commission  
7109 W. Saginaw Hwy.  
P. O. Box 30221  
Lansing, MI 48909

*Via E-filing*

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following are attached for paperless electronic filing:

- Letter from Bryan Newland, President of Bay Mills Indian Community requesting formal consultation with the Commission
- Proof of Service

Sincerely,

Christopher M. Bzdok  
[Chris@envlaw.com](mailto:Chris@envlaw.com)

xc: Parties to Case No. U-20763



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**JUNE 25, 2020**

Chairman Sally Talberg  
Michigan Public Service Commission  
PO Box 30221  
Lansing, MI 48909

**VIA Email** mpssc\_commissioners@michigan.gov

**RE: ENBRIDGE LINE 5 APPLICATION TO CONSTRUCT TUNNEL IN THE STRAITS OF MACKINAC**

On behalf of the Bay Mills Indian Community (Bay Mills) I am writing regarding the April 17, 2020 application submitted by Enbridge Energy, LP (Enbridge) seeking approval of the Line 5 Tunnel Project to construct under the Straits of Mackinac. Bay Mills requests formal government-to-government consultation between Bay Mills and the Michigan Public Service Commission (Commission) as required by the 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (2002 Accord) and more recently directed by Governor Whitmer through the issuance of Executive Directive No. 2019-17 (Directive).

**Request for Government-to-Government Consultation**

As you are surely aware, Bay Mills is a signatory to the March 28, 1836 Treaty of Washington (7 Stat. 491). In the 1836 Treaty Bay Mills reserved off-reservation fishing rights in the Great Lakes, including the Straits of Mackinac, that have been confirmed by the federal courts, *see United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

In an effort to protect these Treaty resources, Bay Mills is requesting formal consultation with the Commission. As set out in the 2002 Accord, consultation is defined as:

a process of government-to-government dialogue between the state and the tribes regarding actions or proposed actions that significantly affect or may significantly affect the governmental interests of the other. Consultation includes (1) timely notification of the action or proposed action, (2) informing the other government of

the potential impact of the action or proposed action on the interests of that government, (3) the opportunity for the other government to provide input and recommendations on proposed actions to the governmental officials responsible for the final decision, and (4) the right to be advised of the rejections (and basis for any such rejections) of recommendations on proposed actions by the governmental officials responsible for the final decision. At § V.

Furthermore, for the purposes of the 2002 Accord:

**"state action significantly affecting tribal interests" is defined as regulations or legislation proposed by executive departments, and other policy statements or actions of executive departments, that have or may have substantial direct effects on one or more tribes, on the relationship between the state and tribes, or on the distribution of power and responsibilities between the state and tribes. State action includes the development of state policies under which the tribe must take voluntary action to trigger application of the policy. *Id.* [Emphasis added]**

On October 31, 2019, Governor Whitmer affirmed the 2002 Accord through the issuance of Executive Directive No. 2019-17 (Directive), again emphasizing a commitment by the State to consult with the Tribal Nations on all matters of shared concern. The Governor has the power to “influence [an] agencies' rulemaking decisions through his or her appointments and directives.” *Michigan Farm Bureau v. Dep't of Env'tl. Quality*, 292 Mich. App. 106, 144 (2011) (finding changed administrative policies after the election of a new governor to be within the constitutional framework). In fact, “non-elected executive department heads, can be expected to carry out policies of the administration as communicated in [an] executive directive to the extent its directions are consistent with applicable law.” Mich. Att’y Gen. Op. No. 7157, 7 (June 2, 2004).

Consequently, the Governor’s Directive lays out a four step process designed to engage in “meaningful communication and collaboration” before “taking an action or implementing a decision that may affect” the Tribal Nations located in the State of Michigan. Directive at 2. The steps include, One – Identification, Two – Notification, Three – Input, Four – Follow Up. The Executive Directive, as part of Step One, recognizes that a Tribal Government “may initiate the consultation process by identifying for a department or agency an activity that may be appropriate for consultation.” *Id.* at 3 § 2(A)(2). Accordingly, Bay Mills is hereby notifying this Commission that the proposed Line 5 tunneling project is an activity appropriate for consultation.

Due to the magnitude of the proposed construction and the far reaching impacts that the construction and continued operation of Enbridge’s Line 5 will have on Bay Mills’ treaty protected resources, Bay Mills requests government-to-government consultation between the Commission, Bay Mills and other impacted Tribal Nations. Government-to-government consultation should be a process of seeking, discussing, and seriously considering the views of Bay Mills, and seeking agreement with Bay Mills on the development of regulations, rules, policies, programs, projects, plans, property decisions, and activities that may affect Treaty rights, Tribal Resources, historic properties, and contemporary cultural practices. This requires true government-to-government collaboration between the Commission and Bay Mills, where high level Commission

representatives meet with Tribal leadership and staff. The Commission should understand that a unilateral briefing given to Tribal Nations by the Commission does not constitute consultation.

In accordance with the Directive, upon notice of such a request the “agency must then evaluate whether the activity is appropriate for consultation, and it must afford substantial weight to the tribal government’s request in performing that evaluation.” *Id.* To be sure, this proposed tunneling activity is certainly appropriate for consultation. Bay Mills looks forward to a confirmation of this request to convene a government-to-government consultation with the Commission in hopes of finding amenable solutions, to protect the invaluable Treaty resources that will be impacted by the proposed tunnel project in the Straits of Mackinac. You should know that this same request is also being made to Michigan’s Department of Environment, Great Lakes and Energy in regards to the Enbridge Line 5 tunneling project. Should you have any questions about this communication please do not hesitate to contact Bay Mills Legal Department at [candyt@bmic.net](mailto:candyt@bmic.net) or [wgravelle@baymills.org](mailto:wgravelle@baymills.org).

Sincerely,



Bryan Newland, President  
Bay Mills Indian Community

Cc via email:

Wenona Singel, Deputy Legal Counsel to the Office of the Governor – [singelw@michigan.gov](mailto:singelw@michigan.gov)  
Paul Proudfoot, MPSC Tribal Liaison – [ProudfootP@Michigan.gov](mailto:ProudfootP@Michigan.gov)

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

**PROOF OF SERVICE**

On the date below, an electronic copy of **Letter from Bryan Newland, President of Bay Mills Indian Community requesting formal consultation with the Commission** was served on the following:

| Name/Party   | E-mail Address   |
|--|--|
| <b>Counsel for Enbridge Energy, Limited Partnership.</b><br>Michael S. Ashton<br>Shaina Reed   | <a href="mailto:mashton@fraserlawfirm.com">mashton@fraserlawfirm.com</a><br><a href="mailto:sreed@fraserlawfirm.com">sreed@fraserlawfirm.com</a>   |
| <b>Counsel for MPSC Staff</b><br>Spencer A. Sattler<br>Benjamin J. Holwerda<br>Nicholas Q. Taylor  | <a href="mailto:sattlers@michigan.gov">sattlers@michigan.gov</a><br><a href="mailto:holwerdab@michigan.gov">holwerdab@michigan.gov</a><br><a href="mailto:taylorl10@michigan.gov">taylorl10@michigan.gov</a> |
| <b>Counsel for Michigan Environmental Council (MEC), and National Wildlife Federation</b><br>Christopher M. Bzdok<br>Lydia Barbash-Riley     | <a href="mailto:chris@envlaw.com">chris@envlaw.com</a><br><a href="mailto:lydia@envlaw.com">lydia@envlaw.com</a>   |
| <b>Counsel for Grand Traverse Band of Ottawa and Chippewa Indians (GTB)</b><br>Bill Rastetter<br>Christopher M. Bzdok<br>Lydia Barbash-Riley | <a href="mailto:bill@envlaw.com">bill@envlaw.com</a><br><a href="mailto:chris@envlaw.com">chris@envlaw.com</a><br><a href="mailto:lydia@envlaw.com">lydia@envlaw.com</a>                                     |
| <b>Counsel for Environment Law &amp; Policy Center</b><br>Margrethe Kearney  | <a href="mailto:mkearney@elpc.org">mkearney@elpc.org</a>   |

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|---|--|
| <b>For Love Of Water (FLOW)</b><br>James Olson  | <a href="mailto:jim@flowforwater.org">jim@flowforwater.org</a>   |
| <b>Counsel for Bay Mills Indian Community (BMIC)</b><br>Christopher M. Bzdok<br>Whitney Gravelle<br>Kathryn Tierney<br>Debbie Chizewer<br>Christopher Clark<br>David Gover<br>Matt Campbell | <a href="mailto:chris@envlaw.com">chris@envlaw.com</a><br><a href="mailto:wgravelle@baymills.org">wgravelle@baymills.org</a><br><a href="mailto:candyt@bmic.net">candyt@bmic.net</a><br><a href="mailto:dchizewer@earthjustice.org">dchizewer@earthjustice.org</a><br><a href="mailto:cclark@earthjustice.org">cclark@earthjustice.org</a><br><a href="mailto:dgover@narf.org">dgover@narf.org</a><br><a href="mailto:mcampbell@narf.org">mcampbell@narf.org</a> |
| <b>Counsel for Tip of the Mitt Watershed Council</b><br>Christopher M. Bzdok<br>Lydia Barbash-Riley<br>Abigail Hawley   | <a href="mailto:chris@envlaw.com">chris@envlaw.com</a><br><a href="mailto:lydia@envlaw.com">lydia@envlaw.com</a><br><a href="mailto:abbie@envlaw.com">abbie@envlaw.com</a>   |

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.  
 Counsel for BMIC

Date: June 25, 2020

By: \_\_\_\_\_  
 Karla Gerds, Legal Assistant  
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 Traverse City, MI 49686  
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